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## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

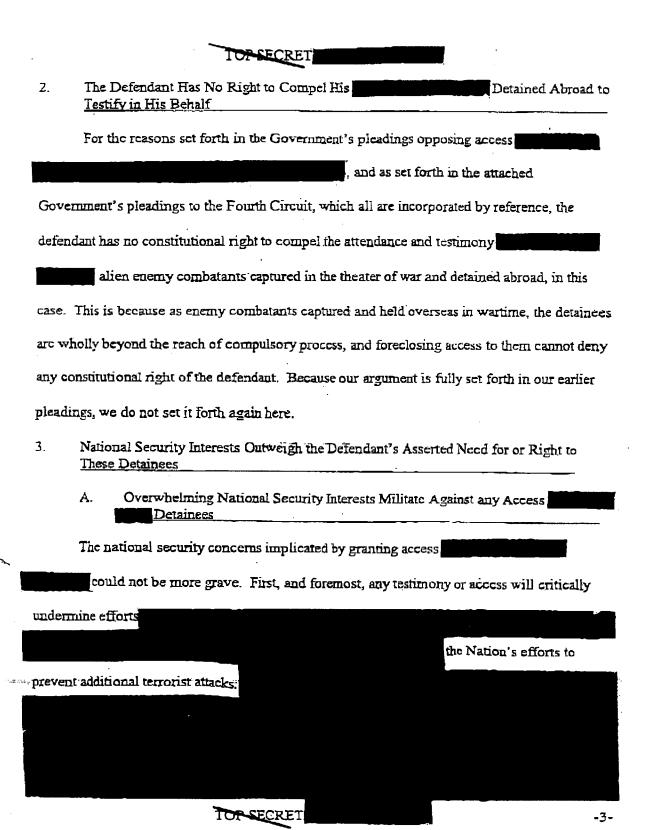
UNITED STATES OF AMERICA	) UNDER SEAL
<b>v</b> .	) Crim No. 01-455-A ) Hon. Leonie M. Brinkena
ZACARIAS MOUSSAOUI	)
GOVERNMENT'S OPPOSITION	TO DEFENDANT'S MOTIONS FOR ACCESS
	Introduction
The United States respectfully o	pposes defendant's motions for access
	As set forth
below, the Court should follow its earlie	er ruling regarding pre-trial access to such detainces.
Further, defendant lacks a right to comp	
in the war on terrorism, because enemy	combatants seized and detained by the Executive
overseas in the midst of an ongoing war	are simply beyond the reach of any right that the
<b>`</b>	n defendant's favor. Second, as is explained below
detainees at issue	he Government's ongoing efforts to prevent further
	national security reasons strongly militate against any
access to detainees. Finally, stand	dby counsel largely fail to articulate the material,
exculpatory, and admissible testimony	
The defendant demands	be called as trial witnesses.  counsel demand unmonitored pretrial access
detainees and that a subpoena ad testif	icandum be issued for them.

compelled to testify. But, even assuming that they possess such material testimony, any such evidence can and should be dealt with by substitutions.

#### Argument

### 1. Defendant Has No Right To Pre-trial Access

Standby counsel begin by seeking pretrial access enemy combatants. In raising this request, standby counsel acknowledge that "the Court has previously denied the defense requests for pre-trial access The attached ex parte affidavit demonstrate that in similar circumstances, therefore, under the "law of the case" doctrine the Court should also deny access to See United States v. Aramonv, 166 F.3d 655, 661 (4th Cir. 1999); United States v. Bell. 5 F.3d 64, 66 (4th Cir. 1993). Even if the Court refuses to apply the "law of the case" doctrine, standby counsel's request for pre-trial access should be denied on the merits for the same reasons set forth in the Government's pleadings captioned Government's Consolidated Response in Opposition to Defense Motions for Pretrial Access and for Writs Ad Testificandum for Testimony at Trial to Produce and Government's Consolidated Response in Opposition to Defense Motions for Pretrial Access and for Writs Ad Testificandum which are incorporated by reference herein. As the attached ex parte declaration demonstrates, these arguments are even more pronounced as applied



Second, any access to the detainees would interrupt

If any access is granted, either pre-trial or mal

will be subordinated to those identified by the defense or the Court,

which focus on historical information that the detainers can provide about Moussaoui. Such insertion by the Court into military operations has been repeatedly rejected by the courts. See Harndi v. Runnsfeld. 316 F.3d 450, 470 (4th Cir. 2003) ("Harndi III") ("litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case."); Harndi v. Rumsfeld. 296 F.3d 278, 283 (4th Cir. 2002) ("Harndi II") ("The federal courts have many strengths, but the conduct of combat operations has been left to others. The executive is best prepared to exercise the military judgement attending the capture of alleged combatants.") (internal citation omitted).

Third, any access will undermine

Any ordered access will necessarily raise concerns about security and inevitably cast doubt on

since it will appear

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decisions may be trumped, without warning, by courts back in the United States. As the Court in Johnson v. Eisentrager, 339 U.S. 763 (1950), warned, having judges countermand military decisions "would diminish the prestige of our commanders," particularly in the eyes of "wavering neutrals." who might come to see assurances of our officers as ineffective and unreliable. Id. at 779. See also American Insurance Association v. Garamendi, 123 S. Ct. 2374, 2586 (June 23, 2003) (noting that "the President has 'unique responsibility' for the conduct of 'foreign and military affairs'") (quoting Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993)); Hamdi v. Rumsfeld. 316 F.3d at 465 ("if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain."); id. at 474 ("the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.").

Finally, any access, particularly for testimony, will lead to a host of other issues that will inevitably arise. For example, will the combatants be entitled to counsel, and can they assert Fifth Amendment rights? The are exposed to the death penalty in either the Article III courts or a military tribunal. Defense counsel will certainly ask them questions under oath that will implicate them in capital crimes, and it seems unlikely -- at least in the ordinary case -- that this Court would permit a witness under oath to answer such questions without counsel. Providing a lawyer, of course, will likely end forever the possibility of securing vital intelligence from the combatants. Such issues demonstrate how disruptive access to the enemy combatants will be.

These concerns represent only a sample of the dire implications for national security that



more detail the profound ramifications resulting from court-ordered access to these enemy combatants.

### B. Materiality

Compared to the paramount national security interests threatened by access, the defense has failed to meet its burden of demonstrating the need for pre-trial or trial access the. First, as the Court found provision of the classified summaries more than adequately vindicates whatever right the defense See Kines v. Butterworth, 669 F.2d 6, has to the information 10 (1" Cir. 1981) (disclosure of informant's grand jury testimony and interview reports adequately alternative to access). Second, contrary to standby counsel's representations, much actually implicates Moussaoui in the conspiracies charged in of what this case. Third, to the extent the Court finds that there are material and admissible statements that these detainees could provide at trial, before finally determining that some method of taking their testimony (e.g., by Rule 15 deposition) must be permitted, the Court should afford the Government an opportunity to avoid the disclosure of classified information to the defendant (and damage to National security) that such depositions would entail by permitting the Government an opportunity to suggest substitutions for those statements the Court has deemed material and admissible. See CIPA § 6(c).

The defendant bears a heavy burden of demonstrating materiality. See United States v. Blevins, 960 F.2d 1252, 1259 (4th Cir. 1992) ("this circuit has made clear that the onus is on the

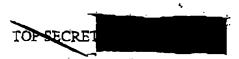
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defendant" to demonstrate that a witness has "material, exculpatory, non-cumulative evidence that is not otherwise available."). See also United States v. Mount, 896 F.2d 612, 621 (1st Cir. 1990) ("Before the absence of defense witnesses can be said to violate either the right to compulsory process or due process, the defendant must show that the testimony from the missing witnesses would have been relevant, material and favorable."). Indeed, as the Fourth Circuit has explained, in the standard CIPA context, "a district court may order disclosure only when the information is at least essential to the defense, necessary to his defense, and neither merely cumulative nor corroborative." United States v. Smith, 780 F.2d 1102, 1110 (4th Cir. 1985) (internal citations and quotation marks omitted) (emphasis added). See also United States v. Zettl, 835 F.2d 1059, 1066 (4th Cir. 1987) (under CIPA procedures, district court must rule, interalia, on whether evidence is merely cumulative or corroborative). "[T]he absence of cumulative testimony cannot, as a matter of law, result in actual prejudice." United States v. Comosona, 848 F.2d 1110. 1114 (10th Cir. 1988). Finally, to be material, the proffered testimony must be admissible. Wood v. Bartholomew, 516 U.S. I, 6 (1995) (disclosure of inadmissible polygraph results can have no direct effect on the outcome of the trial because respondent would not have been able to mention them); Taylor v. Illinois, 484 U.S. 400, 410 (1988) (accused has no "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

1.

Before addressing standby counsel's particular claims:

that Moussaoui is not charged, as standby counsel and the defendant repeatedly have phrased it.



with "September 11." Instead, Moussaoui is charged in six broad conspiracy counts that include as overt acts, inter alia, the preparation for and execution of the terrorist attacks of September 11. As the Court itself has held, these conspiracy counts properly include allegations of conduct independent of the September 11<sup>th</sup> attacks, such as, for example, the dissemination of farwahs regarding attacks against American military personnel in Somalia (Count I, Overt Act 6), the use of training camps to prepare legions of all Queda adherents for the holy war Bin Laden declared against the United States (Count I, Overt Act 2), and all Queda's efforts to obtain components of nuclear weapons (Count I, Overt Act 4). See Order 2/28/03 (denying defendant's motion to strike these overt acts as surplusage).

The common thread of the six conspiracy counts is al Qaeda's ongoing war against the United States. Indeed, the Indictment alleges conduct that both precedes and post-dates the preparation for and execution of the September 11 attacks. Thus, even if al Qaeda never intended to put Moussaoui on one of the four planes on September 11, he would nonetheless be guilty of the charges specified in the Indictment if he otherwise participated in the broad conspiracies charged in the Indictment. Sec. United States v. Bureos, 94 F.3d 849, 858-59-(4th Cir. 1996) (en bane) ("a defendant's participation in the conspiracy need not be explicit; it may be inferred from circumstantial evidence.... In addition to selling narcotics, that participation may assume a myriad of other forms, such as supplying firearms or purchasing money orders for coconspirators or permitting them to store narcotics and other contraband in one's home, or purchasing plane tickets for coconspirators.") (omitting citations and quotations); United States v. Bin Laden, 109 F. Supp. 2d 211, 217 (S.D.N.Y. 2000) (evidence of embassy bombings,

included as overt acts in conspiracy charges, relevant to conspiracy charges against defendants not alleged to have participated in embassy bombings). Moreover, he would be legally responsible for the mass murder committed by his co-conspirators. See United States v. Anjum. 961 F. Supp. 883, 889 (D. Md. 1997) ("[o]nee the conspiracy is in existence, the act and the statement of each member of the conspiracy is considered to be the act and statement of each member of the conspiracy, and each member of the conspiracy is therefore responsible for the acts and the statements of the other members of the conspiracy taken during the existence of the conspiracy, in furtherance of the conspiracy, just as if such person performed such act herself or himself") (citing United States v. Chorman, 910 F.2d 102, 111 (4th Cir. 1990)).

Given these fundamental exioms of conspiracy law, it is clear information, if believed by the jury, would alone convict Moussaoui of the conspiracy counts.

or that Moussaoui

bottom line is that the information including all of the overt acts, alleged in the Indictment, and satisfies the elements the

Government would need to prove to convict Moussaoui.2

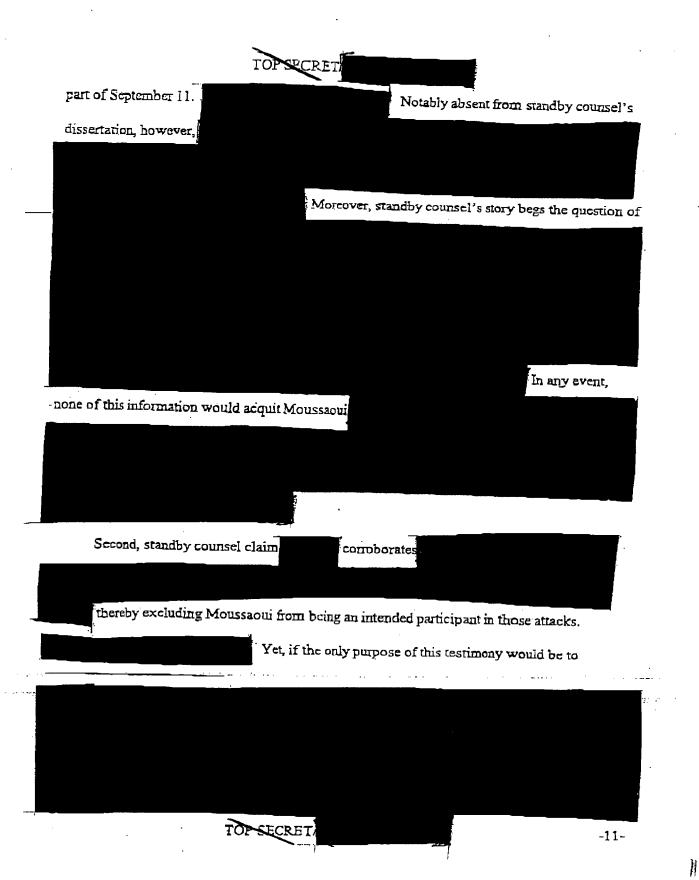
Notwithstanding this, standby counsel claim that they require breaking down their claim to the categories identified by the Court as material to the defense in connection with the previous motion for access

First, standby counsel claim information is relevant to explain further

Morever, standby counsel suggest that the is proof that Moussaoui was not

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Estandby counsel continue to base many of their materiality claims on the so-called "20th Hijacker" theory of the Government's case. Yet, as previously noted in other fillings before this Court, the Government has never embraced that theory in any pleading, let alone any charging instrument, in this case. Instead, the "20th Hijacker" theory appears to be a creation of the media coverage of this case and the isolated statements of certain government officials in the immediate aftermath of the September 11th attacks, and long before the defendant was indicted. As such it should have no bearing on this motion. See United States v. Purdy, 144 F 3d 241, 246 (2d Cir. 1998) ("The Government's theory of how many of the twenty-two purchase orders related to government contracts may have changed over the course of its investigation, but an earlier investigative theory is hardly the equivalent of a bill of particulars or other formal admission in an earlier trial. To bind the Government forever to a preliminary investigative theory to which it never formally committed would only discourage further investigation and thereby impede the truth-finding process.").



corroborate

then standby counsel's claim

should be rejected as unnecessarily cumulative. See Barnes v. Thompson, 58 F.3d 971, 975 (4th Cir. 1995) (no Brady violation where suppressed information available from other sources); United States v. Wilson, 901 F.2d 378, 380 (4th Cir. 1990) (same); United States v. Edwards, 577 F.2d 883, 890 n.10 (5th Cir. 1978) ("We recognize that the testimony of Davis might have the cumulative effect of increasing the weight of the evidence, but, nevertheless, conclude that the absence of Davis did not sufficiently prejudice the defendant."). Moreover, as noted previously, even if Moussaoui was being saved for another hijacking attack against the U.S., that does nothing to remove him from the broad conspiracies charged in this case and therefore is not material and exculpatory. United States v. Leavis. 853 F.2d 215, 218 (4th Cir. 1988) (single conspiracy exists where key actors, methods and goals overlap); United States v. Crockett. 813 F.2d 1310, 1317 (4th Cir. 1987) (same).

Third, standby counsel claim is necessary to explain the reasons why Moussaoui was not in contact with the other hijackers.

can be established by other evidence, thus obviating the need to call See United States v. Harley, 682 F.2d 1018, 1020 (D.C. Cir. 1982) (proper for the

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court to consider whether there are "adequate alternative means" for the defendant to prove "the same point").

is necessary to establish the existence of a Fourth, standby counsel contend Such statements, however, are not exculpatory for the guilt phase.

Indeed, as noted above, they establish Moussaoui's participation in the conspiracies charged in

the Indictment. a witness to rebut the Government's

Fifth, standby counsel argue claim that Moussaoui's lies to investigators after his August 2001 arrest did not result in the This deaths of thousands of individuals on September 11. claim is specious as it assumes that Moussaoui would had to have been aware of all the details of the September II the plot to have his lies result in mass murder. It also rests on a misrepresentation of Moussaoui's lies to investigators, and the Government's theory about the impact of those lies on the ability of the Government to prevent the hijacking attacks from occurring. For example, standby counsel actually suggest that Moussaoui's statement that he came to the United States to Yet, as described learn to fly was technically accurate.

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below, Moussaoui's lies were far more extensive and pemicious than standby counsel portray because they demonstrate that Moussaoui concealed his role in an al Qaeda plot to fly hijacked airplanes into buildings in the United States, instead of being the harmless words of a student or tourist. Thus, if Moussaoui had been forthcoming with those details his truthful statements would have allowed government officials to prevent Moussaoui's cohorts from carrying out their deadly attacks on September 11. As such, it is clear testimony is not necessary to Moussaoui's defense.

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Standby counsel go to significant effort to establish

had significant involvement in the 9/11 attacks as outlined in the indictment. Thus, standby

counsel give a synopsis of the summaries produced to the defense

under CIPA § 4,

it is insufficient to meet the defense burden of showing how

testimony would be exculpatory and admissible. Therefore, the defense has no right to call him as a witness.

First,

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is simply not exculpatory. See United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990) ("A defendant may not seek to establish his innocence... through proof of the absence of criminal acts on specific occasions."; United States v. Kennedy, 819 F. Supp. 1510, 1519 (D. Colo. 1993) ("Brady requires the production of material information which is 'favorable to the accused,' that is, exculpatory information, not information which is merely 'not inculpatory' and might-

therefore form the groundwork for some argument for the defendant."). Further, even if such evidence is can be deemed exculpatory, proven by means other than his testimony is a material and exculpatory witness boils Standby counsel's claim down to one claim. TOP SECRET -15-



First, this statement is inadmissible hearsay,

Accordingly, it will not be admissible in the guilt phase of the trial. Moreover,

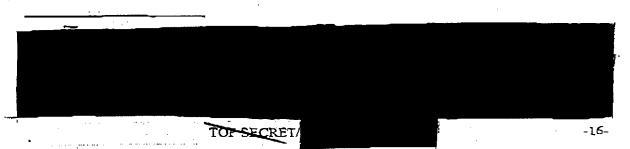
even if admitted in the penalty phase, this statement loses much of its apparent exculpatory

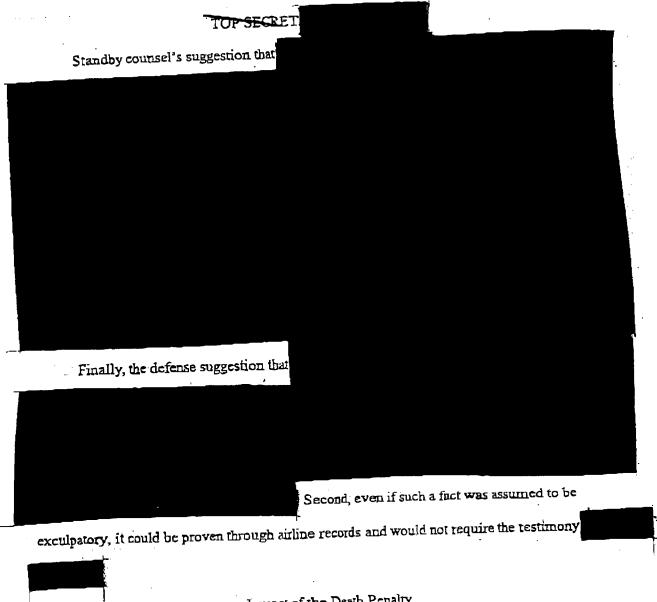
Finally, even assuming for purposes of this pleading, however, that this one statement is exculpatory and admissible in

this pleading, however, that this one statement is exculpatory and admissible in the penalty phase, the defense can make this argument to the jury based on evidence (already produced)

Or, we suggest, as noted

below, that this information be provided to the jury by substitution rather than testimony.





## Impact of the Desth Penalty

Standby counsel advance two additional reasons related to defendant's capital-eligibility First, standby counsel argue that as grounds for needing the testimony is certainly exculpatory to the extent that "[t]he expected testimony This statement is simply not do not face or receive a death sentence . -17-

face potential death sentences in either the Article III courts or a military tribunal. See The President's Military Order of November 13, 2001, 66 Fed. Reg. 57833, Sec. 4(a); Department of Defense Military Commission Order N. I., March 21, 2002, Sec. 6G. Therefore, the "equally culpable" mitigator set forth in 18 U.S.C. § 3592(a)(4) does not apply

Cf. United States v. Bin Laden, 156 F. Supp. 2d 359, 370 (S.D.N.Y. 2001)

(equally culpable mitigator applied to co-defendants captured in Europe where extradition agreements precluded death penalty); United States v. Beckford, 962 F. Supp. 804, 815 (E.D. Va. 1997) (equally culpable mitigator applied to co-conspirators not charged with capital-eligible offenses).

Standby counsel next argue that the testimony help establish that defendant is not constitutionally or statutorily eligible for the death penalty. This argument fails, however, because, even if their statements are taken in the light most favorable to the defense, they still establish that defendant was an active participant in a coordinated plan of attack upon the United States that included flying planes into American buildings.

Defendant's mens rea clearly (and admittedly) consisted of an intent to kill which far exceeds that demanded by the Supreme Court's decisions in Tison v. Arizona, 481 US 137 (1987), and Enmund v. Florida, 458 US 782 (1982).

As to the gateway factors set forth in 18 U.S.C. § 3591(a)(2), the Government has tendered two different theories to support the gateway factors in § 3591(a)(2)(C) & (D), neither of which would be affected by

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First, the Government identified the "act" for purposes of both subsections (C) and (D) as the defendant's participation in the conspiracy. Even if defendant attack upon American buildings, his trained to serve as a pilot/hijacker participation was still in furtherance of the conspiracy which directly resulted in death, so this argument does not change.

Second, the Government argued that defendant's lies when interviewed on August 16 and 17, 2001, constituted the "act" for purposes of subsection (C). FBI and INS agents first interviewed defendant on August 16, 2001, after his arrest for immigration violations. During this initial interview, defendant lied by telling the agents that he sought the flight training purely for personal enjoyment and, upon completion of the training, he intended to engage in sightsceing in New York City and Washington, D.C. When interviewed for the second time on August 17, 2001, defendant denied that he was an extremist intent on using his aviation training in furtherance of a terrorist goal and, instead, reiterated that he merely sought flight training for in the light most favorable personal enjoyment. Viewing to the defense, at the very minimum, defendant should have said truthfully (if he were not trying to conceal the murderous conspiracy): (1) "I am a member of al Qaeda and I have sworn bayat to Usama bin Laden;" (2) "I was sent to the United States to take flight training to fly a plane into a building in the U.S.," (3) "Usama bin Laden personally approved my participation in the attack,"

(6) "Other members of al Queda will assist me in the attack even though I don't know who they

None of these points changes the legal analysis set forth in the

Government's Response

#### Substitutions

If the Court finds that would provide material, exculpatory, admissible, non-cumulative evidence, the Government may be able to propose appropriate substitutions pursuant to CIPA § 6(c)(1) for the specific evidence identified by the Court. The Government understands that the Court previously rejected substitutions

Nonetheless, the Government respectfully requests 10 days from any findings of materiality to tender the proposed substitutions.

Since the Court has not yet ruled on standby counsel's various motions seeking to dismiss the death notice, the Government would welcome an opportunity to further brief the defendant's capital eligibility if the Court so desires.

<sup>&</sup>lt;sup>9</sup> CIPA allows for proposed substitutions under  $\S$  6(c)(1) only after a hearing pursuant to  $\S$  6(a)(1) and a finding by the Court as to "use, relevance, or admissibility of classified information." CIPA  $\S$  6(a)(1).



For the foregoing reasons, and the reasons set forth in earlier Government pleadings, the defense motions should be denied.

Respectfully Submitted,

Paul J. McNulty United States Attorney

Ву:

Robert A. Spencer Kenneth M. Karas

David J. Novak

Assistant United States Attorneys

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### CERTIFICATE OF SERVICE

I certify that on July 29, 2003, a copy of the foregoing Government's pleading (without a copy of the ex parte submissions) was provided to the Court Security Officer for service upon:

Frank Dunham, Jr., Esq.
Office of the Federal Public Defender
1650 King Street
Suite 500
Alexandria, Virginia 22314
Facsimile: (703) 600-0880

Alan H. Yamamoto, Esq. 108 N. Alfred St., 1° Floor Alexandria, Va. 22314-3032 Facsimile: (703) 684-9700

Edward B. MacMahon, Ir., Esq. 107 East Washington Street Middleburg, VA 20118

Robert A. Sponcer Assistant U.S. Attorney

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